Supreme Court, U. S.
FILED
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MICHAEL RODAK, JR., CLERK

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1976
No. _____ 76-1379

ALFRED BERNARD DAVIS, III,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF
APPEALS FOR THE NINTH CIRCUIT

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IN THE
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October Term, 1976
No. _____

ALFRED BERNARD DAVIS, III,
Petitioner,
vs.
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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Petitioner, ALFRED BERNARD DAVIS, III, respectfully prays for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit to review its opinion affirming a judgment of the United States District Court for the Central District of California, sentencing petitioner to a term of three (3) years imprisonment for violation of Title 21 U.S.C. §§ 846 and 841(a)(1) and Title 18 U.S.C. § 2, and further adjudging that upon his release from confinement, petitioner be ordered to serve a special

parole term of three (3) years pursuant to 21 U.S.C. § 841(b)(1)(A) (C.T. 42).

OPINION BELOW

Trial in the Federal District Court was by court. The original opinion of the Ninth Circuit Court of Appeals affirming the judgment is, as yet, unreported. It comprises Appendix "A" of this Petition. The Petition for Reheraing en banc is likewise unreported and constitutes Appendix "B" of this petition. The Judgment of the court below is contained in the Clerk's Transcript from the Circuit Court.

GROUNDS ON WHICH THE JURISDICTION OF THIS COURT IS INVOKED

The date of the judgment sought to be reviewed and the time of its entry is March 9, 1977 (R.C.A. Judgment).

The statutory provision believed to confer jurisdiction on this Court to review the judgment in question by Writ of Certiorari is 28 U.S.C. § 1254.

QUESTION PRESENTED FOR REVIEW

I

WHETHER PETITIONER DAVIS WAS DENIED HIS CONSTITUTIONAL RIGHT TO CONFRONT WITNESSES UNDER THE SIXTH AMENDMENT TO THE UNITED STATES CONSTITUTION, THEREBY FORECLOSING TO HIM THE DEFENSE OF ENTRAPMENT.

STATEMENT OF THE CASE

On January 5, 1976, the Federal Grand Jury for the Central District of California returned a three count Indictment charging ALFRED BERNARD DAVIS, III, John Doe, aka "Slim", Richard Henry Pierce and Regina Mary Pierce with violations of Title 21 U.S.C. §§ 846 and 841(a)(1) and 18 U.S.C. § 2. (C.T. 8-12)[1/]

Count One charged all four defendants with a violation of 21 U.S.C. § 846, to wit, conspiracy to possess with intent to distribute a narcotic

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1/ "C.T." refers to the Clerk's Transcript; "R.T." refers to the Reporter's Transcript.

drug controlled substance and conspiracy to distribute a narcotic drug controlled substance in violation of 21 U.S.C. § 841 (a)(1). This count alleged nine overt acts performed in the furtherance of the conspiracy.

Count II charged ALFRED BERNARD DAVIS III and John Doe, aka "Slim" with a violation of 21 U.S.C. § 841(a)(1), to wit, possession with intent to distribute approximately 256.6 grams of heroin, a narcotic drug controlled substance, on November 29, 1975.

Count Three charged ALFRED BERNARD DAVIS, III and John Doe, aka "Slim" with a violation of 21 U.S.C. § 841(a)(1), to wit, distribution of 256.6 grams of heroin, a narcotic drug substance, on November 29, 1975. Count Three further charged Richard Henry Pierce and Regina Mary Pierce with a violation of 18 U.S.C. § 2, to wit, aiding and abetting the commission of the above offense.

On January 19, 1976, Petitioner DAVIS pleaded not guilty as charged. The matter was assigned to the Honorable Warren J.

Ferguson and continued to February 9, 1976 for trial setting (C.T. 13).

On March 23, 1976, on Petitioner DAVIS' motion, Joseph T. Vodnoy was substituted in place of William Leeds as attorney of record. Trial by jury was waived and the first day of trial was had (C.T. 39).

On March 25, 1976, both sides rested. Petitioner DAVIS' Motion for Judgment of Acquittal was denied. The Court found each of the defendants guilty as to each Count charged in the Indictment. Sentencing was set for April 22, 1976 (C.T. 41).

On April 22, 1976, ALFRED BERNARD DAVIS, III was sentenced to the custody of the Attorney General for three (3) years on each count, to begin and run concurrently (C.T. 42). It was further adjudged that upon release from confinement ALFRED BERNARD DAVIS shall serve a special parole term of three (3) years pursuant to 21 U.S.C. § 841(b)(1)(A) (C.T. 42).

On May 4, 1976, Petitioner DAVIS timely filed his Notice of Appeal.

On January 13, 1977, the Ninth Circuit Court of Appeals rendered an opinion affirming the judgments of conviction and sentence. Petitioner DAVIS, through his newly-retained attorneys, LUKE McKISSACK and GILBERT CATON, finally filed a Petition for Rehearing En Banc. That petition was denied on March 9, 1977. This Petition for Writ of Certiorari is timely filed and is lawfully before this Honorable Court.

CONSTITUTIONAL PROVISIONS AND STATUTES RELIED ON

Relied on are Amendment VI and 21 U.S.C. §§ 841(a)(1) and 846 and 18 U.S.C. § 2 and the Federally proclaimed defense of entrapment.

STATEMENT OF FACTS

A substantial portion of the evidence presented in this case was in the form of tape recordings of conversations. By stipulation, it was agreed that the Court Reporter need not transcribe the tapes into the transcript of the proceedings (R.T. 55). Therefore, in discussing

these taped conversations, a general description of what tranpsired will be given, with an appropriate reference to the Reporter's Transcript indicating at what point a particular tape was received into evidence.

Special Agent Joseph Gordon of the Drug Enforcement Administration testified that in investigating the present case, he utilized an informant by the name of Frank Westbrook (R.T. 46). Westbrook was arrested in Detroit in 1975 in possession of narcotics. His subsequent testimony on behalf of the Government resulted in his case being dismissed. He then became a regular paid informant for the DEA (R.T. 46.47).

In connection with the present case, Westbrook received a reward of $1,200 and approximately $300.00 in expenses (R.T. 48). November 6, 1975, Westbrook made three telephone calls from Detroit to defendant Richard Henry Pierce in Los Angeles. These conversations were monitored and recorded, with Westbrook's consent, by Agent Gordon (R.T. 49).

During the course of these three conversations, Agent Gordon was introduced to Pierce and negotiated with him for the delivery of three kilos of heroin. The delivery was to be made in Los Angeles. (See Exhibits 1, 1A, 2, 2A and 2B, R.T. 55-56, 59).

On November 22, 1975, Pierce called Agent Gordon in Detroit and advised him that he was ready to complete the transaction (R.T. 63-64).

On November 25, 1975, Agent Gordon arrived in Los Angeles and tried to contact Pierce on three occasions. Agent Gordon was advised that Pierce was out of town. (See Exhibit 3A, 3B and 3C, R.T. 69).

On November 22, 1975, Agent Gordon was advised by Regina Pierce that she would complete the transaction with him (R.T. 71-73; Exhibit 3D, R.T. 73).

On November 28, 1975, Regina Pierce called Agent Gordon and introduced him to Petitioner DAVIS. After short negotiations, DAVIS agreed to bring the heroin to the hotel where Agent Gordon was staying. (See Exhibit 3F, R.T. 78).

At approximately 1:00 P.M. on November 28, 1975, DAVIS and Regina Pierce went to the hotel where Agent Gordon was staying. Further negotiations took place, and an impasse was reached. Agent Gordon then insisted on talking with DAVIS' source. (See Exhibits 4 and 4A, R.T. 81).

At approximately 3:30 P.M. on November 28, 1975, Agent Gordon met with DAVIS and a man introduced to him as "Slim," who said he was DAVIS' source of heroin. "Slim" and Agent Gordon discussed the delivery of heroin (R.T. 92-95).

On November 29, 1975, at approximately 6:00 A.M., Agent Gordon again met with DAVIS and "Slim". "Slim" stated that he was ready to complete the transaction but Agent Gordon indicated that he did not have the necessary money. "Slim" instructed DAVIS to wait with Agent Gordon to complete the transaction. DAVIS then accompanied Agent Gordon to his hotel room where he was subsequently arrested in possession of narcotics (R.T. 97-112).

On Cross-examination of Agent Gordon the court refused to allow counsel for Mr. DAVIS to ask any questions regarding

Westbrook's possible entrapment of defendant Richard Henry Pierce (R.T. 168).

The Court then stated that Mr. DAVIS could not have the benefit of any entrapment relating to Richard or Regina Pierce, even if Mr. DAVIS was shown to have been their agent. The Court ruled that entrapment was a personal defense (R.T. 169).

Defendant Richard Pierce testified that Mr. DAVIS was employed by him at his liquor store and that his attempt to involve DAVIS in this narcotic transaction was prompted by Westbrook's attempts to persuade Pierce into selling narcotics himself (R.T. 233-234).

I

PETITIONER DAVIS WAS DENIED HIS CONSTITUTIONAL RIGHT UNDER THE SIXTH AMENDMENT TO THE UNITED STATES CONSTITUTION TO CONFRONT WITNESSES BY BEING DENIED THE RIGHT TO ELICIT PROOF OF ENTRAPMENT OF THE PERSON WHO DEPUTIZED HIM TO TRANSFER NARCOTICS.

The issue presented to the Court for consideration on this appeal is <u>not</u> whether Petitioner DAVIS was entrapped. That question was never reached at the trial. Rather, the issue is whether the trial court abused its discretion by precluding defense counsel for DAVIS from inquiring into Westbrook's possible entrapment of defendant Richard Pierce.

Thus, the question properly framed, is whether Petitioner DAVIS should be allowed to assert the possible entrapment of defendant Richard Pierce as a defense to the charges brought against him.

There can be no question that the right of cross-examination is included in the right of an accused in a criminal case to confront the witnesses against him secured by the Sixth Amendment.

Pointer v. Texas (1965) 380 U.S. 400, 85 S.Ct. 1065, 13 L.Ed.2d 923; Bruton v. United States (1968) 391 U.S. 123, 88 S.Ct. 1620, 20 L.Ed.2d 476.

Petitioner DAVIS contends that this fundamental right was abridged when the trial court refused to allow him to inquire into the possible entrapment of defendant Richard Pierce.

The theory advanced herein, while one of "first impression" in this Court, is not novel and has received considerable attention by lower courts. In the case of Carbajal-Portillo v. United States (9th Cir. 1968), 396 F.2d 944, Carbajal was asked by a man in Mexico to deliver heroin from Sinaloa, Mexico to Mexicali, Mexico. In Mexicali, Carbajal found that he could not sell the heroin but was told to go to Calexico, California, where he might sell it. There, he met with Ricos, who was actually a government agent named Halcon, who indicated he would purchase the heroin, but only if Carbajal would deliver it in the United States. Carbajal balked at the idea and only consented to it at the insistence of Halcon. When

Carbajal made the delivery he was arrested and ultimately convicted.

To assist him in making the delivery, Carbajal enlisted the aid of Vega who thought he merely was driving Carbajal across the border. Vega was also arrested and convicted.

On appeal, the Court held that Carbajal was entrapped by Halcon because he had induced an otherwise reluctant Carbajal to bring the heroin into the United States. However, Vega's conviction was affirmed because he had no standing to assert entrapment since he had had no contact or dealings with Halcon.

In affirming Vega's conviction, the Court stated:

> Thus we have the paradoxical situation in which the principal participant goes free because he was entrapped, while his lesser confederate must remain in prison and serve his sentence unless the "umbrella" of Carbajal's entrapment is stretched to cover Vega as well. (396 F.2d at 947)

The Court then held that the "umbrella" did not cover Vega.

In dissenting as to Vega, District Judge Gray stated:

> [I]t seems to me that the "umbrella" of Carbajals entrapment should, indeed, be stretched to cover Vega as well. In our opinion in this case with respect to Carbajal, we refer to Judge Ely's comments in Notaro v. United States 363 F.2d 169, 173 (9th Cir. 1966), in which he explained the rationale of Sorrells v. United States 287 U.S. 435, 53 S.Ct. 210, 77 L. Ed. 413 (1932):
>
> > "It was not thought to be right that a Government should institute and successfully pursue prosecution for the commission of an act which the prosecuted would not likely have committed but for the importunity of an agent of the government itself."

I believe that such comment is equally applicable to Vega.

> [A]s has been discussed in the opinion concerning Carbajal's appeal, the transportation and sale of heroin stemmed directly from the persuasion exerted by the narcotics agent. But for the latter's activities, Carbajal would not have agreed to make the sale in the United States and would not have been looking for someone to help him with transportation. There is no indication that Vega previously dealt with narcotics in any way or that he was "*** awaiting any propitious opportunity to commit the offense." cf. United States v. Sherman 200 F.2d 880, 882 (2d Cir. 1952). Thus, it may be said that he was convicted of having perpetrated a crime that he "*** would not likely have committed but for the importunity of an agent of the Government itself." (See the

above quoted passage from Notaro)

> [U]nder the circumstances here concerned, I cannot agree with the majority that "the Government agent played no part including his [Vega's] crime." I would reverse as to Vega for the same reasons of enlightened public policy, as embodied in the doctrine of entrapment, that now cause Carbajal to go free. It seems to me to that the interests of justice and simple fairness are little served by releasing the one without the other. [Emphasis added]
> (296 F.2d at 948.)

In Sorrells v. United States (1932) 287 U.S. 435, 445, 53 S.Ct. 210, 77 L.Ed. 413, Chief Justice Hughes discussed the law of entrapment and reasoned:

> When the criminal design originates, not with the accused but is conceived in the mind of government officers, and the

> accused is by persuasion, deceitful representation, or inducement lured into the commission of a criminal act, the government is estopped by sound public policy from prosecuting therefor.

Thus, the theoretical underpinnings of the defense of entrapment seem to be that the government should not be allowed to benefit from its own misconduct. This is the exact same rationale which underlies the exclusionary rule which prohibits the government from using as evidence material seized in the course of an illegal search.

Not only is evidence which is seized illegally inadmissible, but so is evidence which is discovered by exploitation of illegally seized evidence. See generally Silverthorne Lumber Co. v. United States (1920) 251 U.S. 385, 40 S.Ct. 182, 64 L.Ed. 319; Nardone v. United States (1939) 308 U.S. 338, 60 S.Ct. 266, 84 L. Ed. 307; Wong Sun v. United States (1963) 371 U.S. 471, 83 S.Ct. 407, 9 L.Ed.2d 441.

The so-called "Fruit of the Poisonous Tree Doctrine" as enunciated in the above cases is not, however, absolute. If the evidence obtained by exploiting illegally obtained evidence could have been secured independently of that evidence or if the evidence can be "purged of the primary taint" it may then be admissible.

This doctrine of exploiting illegally obtained evidence should be equally applicable to entrapment! In both instances, the government is seeking to benefit from its initial illegal activities. The "taint" may be attenuated where the entrapment of an accused should not properly be extended to another accused. However, where there is an unbroken causal link between the initial police inducement and the ultimate criminal acts of an accused, that person should be given the full benefit of all available defenses. To hold otherwise works a "manifest injustice" on an accused not "fortunate" enough to have had direct dealings with the government.

The case at bar presents an ideal opportunity for this Court to adopt a new

formulation of the standing required to assert the defense of entrapment.

The trial court refused to allow Petitioner DAVIS to inquire as to the possible entrapment of defendant Richard Pierce (R.T. 167-170). The evidence presented showed that Agent Gordon had no contact with Petitioner DAVIS until after Gordon and Westbrook had arranged to purchase heroin from Richard Pierce. Moreover, Richard Pierce testified that DAVIS was employed by him at his liquor store and that his attempt to involve DAVIS in the narcotic transaction was prompted by Westbrook's attempts to persuade Pierce into selling narcotics himself.

There is no doubt that Westbrook was an agent of the government as he was a paid informant. Regardless of defendant Richard Pierce's attempt to prove that he may have been entrapped, Petitioner DAVIS should also have been given the opportunity to elicit information tending to show the entrapment of Pierce with an eye on the theory that DAVIS was induced to commit criminal acts as a direct result of Pierce's entrapment.

Had it not been for Agent Gordon and Westbrook, DAVIS would not have been involved in this illegal activity. Judge Gray, dissenting in Carbajal-Portillo v. United States, supra, eloquently expressed the reasons why the entrapment defense should be extended to cover such persons as Petitioner DAVIS. There can be no doubt that a nation which claims to adhere to an "enlightened public policy" must recognize that the "interests of justice and simple fairness are little served" by not allowing defendant DAVIS to pursue the question of defendant Richard Pierce's entrapment.

Petitioner DAVIS contends that the trial court manifestly abused its discretion by not allowing Petitioner DAVIS to cross-examine Agent Gordon as to the possible entrapment of defendant Richard Pierce. As a result, petitioner DAVIS' constitutional rights secured by the Sixth Amendment were clearly violated.

This Court has systematically rejected attempts to obtain an evidentiary hearing on new issues at the appellate level, leaving that responsibility to the trial

court. Witherspoon v. Illinois, 391 U.S. 510, 517 (1968) and Bumper v. North Carolina, 391 U.S. 543, 545 (1968). In order for an appellate court to re-examine an existing rule, it must have an adequate record before it.

In Witherspoon, this Court was presented with the issue of a State disqualifying prospective veniremen in the guilt phase of a capital case when such prospective jurors were either opposed to capital punishment or indicated conscientious scruples against inflicting it. The appellate briefs presented considerable data to the high court showing that exclusion of prospective jurors opposed to capital punishment results in an unrepresentative jury on the issue of guilt. The petitioner therein cited surveys and made reference to articles by psychologists and sociologists which clearly supported his position.

Through Mr. Justice Stewart, this Court stated (391 U.S. at 517-518):

> We simply cannot conclude, either on the record now before us or as a matter of judicial

notice, that the exclusion of jurors opposed to capital punishment results in an unrepresentative jury on the issue of guilt or substantially increases the risk of conviction. In light of the presently available information, we are not prepared to announce a per se constitutional rule requiring the reversal of every conviction returned by a jury selected as this one was. (Emphasis added.)

The crux of Mr. Justice Stewart's statement is that this Court was chary to establish a rule of significant gravity without a properly documented record.

Procedurally, in the court below, petitioner was not allowed to cross-examine the government agent on the issue of entrapment of petitioner. This should have been allowed so that a fully documented record could have been presented to this Court. Accordingly, the cause should be remanded to the Federal District Court for a new trial or a hearing wherein the proper record may be presented in

order for this Court to properly be positioned to rule on this crucial issue.

CONCLUSION

For the aforegoing reasons, this cause should be remanded for either a new trial or a hearing affording the accused his right to confront witnesses, as guaranteed by the Sixth Amendment in order to establish the proper factual record for this Court to determine the extent of the protective umbrella of entrapment.

Respectfully submitted,

LUKE McKISSACK

Attorney for Petitioner
DAVIS

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

FILED
JAN 13 1977
EMIL E. MELFI, JR.
Clerk, U.S. Court of Appeals

UNITED STATES OF AMERICA, Plaintiff-Appellee, vs. REGINA MARY PIERCE, Defendant-Appellant.	)	NO. 76-2008 MEMORANDUM
UNITED STATES OF AMERICA, Plaintiff-Appellee, vs. ALFRED BERNARD DAVIS, III, Defendant-Appellant.	)	NO. 76-2212

Appeal from the United States District Court for the Central District of California

Before: DUNIWAY and ANDERSON, Circuit Judges, and SCHWARZLER,* District Judge

The evidence is sufficient to support

*The Honorable William W. chwarzer, United States District Judge for the Northern District of California, sitting by designation.

a finding that there was one conspiracy, of which Pierce was a member, and from which she did not withdraw. Thus, she is liable for the acts of her co-conspirators even though she was not present at the heroin sale. United States v. Jones, 9 Cir., 1970, 425 F.2d 1048, 1051. The evidence is also sufficient to support the aiding and abetting conviction.

Entrapment is a personal defense, and so a conspirator lacks standing to assert the entrapment of a co-conspirator as a defense. United States v. Azadian, 9 Cir., 1971, 436 F.2d 81. Carbajal-Portillo v. United States, 9 Cir., 1968 396 F.2d 944. Therefore, Davis could not assert Pierce's alleged entrapment as a defense, and the trial court's refusal to allow Davis' attorney to cross-examine concerning Pierce's possible entrapment was not error.

Affirmed.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

FILED

MAR 9 1977

EMIL E. MELFI, JR.
Clerk, U.S. Court of Appeals

UNITED STATES OF AMERICA, Plaintiff-Appellee, vs. ALFRED BERNARD DAVIS, III, Defendant-Appellant.	)	No. 76-2212 O R D E R

The panel as constituted in the above case has voted to deny the petition for rehearing and to reject the suggestion of a rehearing in banc.

The full court has been advised of the suggestion for in banc rehearing, and no judge of the court has requested a vote on the suggestion for rehearing in banc. Fed. R. App. P. 35(b).

The petition for rehearing is denied and the suggestion of a rehearing in banc is rejected.

APPENDIX "C"

APPENDIX "C" - 21 U.S.C. Sec. 841(a)(1)

§ 841. Prohibited acts A - Unlawful acts

(a) Except as authorized by this subchapter, it shall be unlawful for any person knowingly or intentionally -

(1) to manufacture, distribute, or possess with intent to manufacture, distribute, or dispense, a controlled substance;

APPENDIX D

APPENDIX "D" - 21 U.S.C. Sec. 846

§ 846. Attempt and conspiracy

Any person who attempts or conspires to commit any offense defined in this subchapter is punishable by imprisonment or fine or both which may not exceed the maximum punishment prescribed for the offense, the commission of which was the object of the attempt or conspiracy.

Pub. L. 91-513, Title II, § 406, Oct. 27, 1970, 84 Stat. 1265.

APPENDIX E

APPENDIX "E" - 18 U.S.C. Sec. 2

§ 2. Principals

(a) Whoever commits an offense against the United States or aids, abets, counsels, commands, induces or procures its commission, is punishable as a principal.

(b) Whoever willfully causes an act to be done which if directly performed by him or another would be an offense against the United States, is punishable as a principal.

June 25, 1948, c. 645, 62 Stat. 684; Oct 31, 1951, c. 655, § 17b, 65 Stat. 717.

APPENDIX F

APPENDIX "F" - UNITED STATES CONSTITUTION AMENDMENT VI

AMENDMENT VI - JURY TRIAL FOR CRIMES, AND PROCEDURAL RIGHTS

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistanc of Counsel for his defense.